UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

TEXAS DENTAL ASSOCIATION	§		
	§		
and	§		
	§		
NATHAN CLARK, an Individual	§	**Cases Nos.**	**16-CA-25349**
	§		**16-CA-25445**
and	§		**16-CA-25383; and**
	§		**16-CA-25840.**
BARBARA JEAN LOCKERMAN,	§		
an Individual	§		
	§		
and	§		
	§		
PATRICIA ST. GERMAIN, an Individual	§		

RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT

TO THE NATIONAL LABOR RELATIONS BOARD:

Respondent Texas Dental Association ("TDA") respectfully excepts to the Decision of Administrative Law Judge George Carson II (the "ALJ"), and in support of its request that his recommendations be rejected, would show the Board the following:

I. Statement of the Case

As shown by the testimony[1] and evidence[2] in the record, this case arises not from protected concerted action concerning employees' conditions of employment, but from an improper attempt by employees to protest the firing of a supervisor whose job did not affect their conditions of employment.

1. Respondent TDA is a professional association serving Texas dentists. GC-2A. Mary Kay Linn, TDA's executive director, manages the day-to-day business of the association,

[1] For convenience, citations to the record will be in the format R(volume)-page:line, i.e., a cite to volume 2 of the record, page 83, lines 15-18 will be referenced as R2-83:15-18 .

including a staff of approximately thirty people. R1-17:23-25. Ms. Linn is hired by the board of directors and reports to them. R1-31:4-7.

2. In November of 2005, Katherine Simms, who at the time was director[3] of TDA's Ethics and Judicial Committee and its Peer Review Council, R1-123:23-25, informed Ms. Linn that she had been having an affair with another director, Jay Bond, who had ended the relationship. R2-334:15-18. Simms asked for and received a change of parking space to distance her from Bond's parking space. She also requested a change of office away from his office, but refused to accept the one Ms. Linn offered. R2-334:19 through 335:10.

3. In December 2005, Ms. Linn terminated the employment of a long-time maintenance worker for TDA, Victor Sanchez, after completing a progressive disciplinary process that had not produced any improvement in his performance. R2-333:20 through 334:4. The fact that Mr. Sanchez was discharged the day after a staff Christmas party upset one of the charging parties, Patricia St. Germain. R1-300:14-21.

4. After Simms revealed her affair, her behavior toward Ms. Linn and other TDA directors deteriorated. Despite having been a good employee up to that time, Simms frequently became angry and argumentative with other directors and with Ms. Linn. She would yell at the other directors, slam doors, storm into Ms. Linn's office, and scream at her. On one occasion, her behavior toward Ms. Linn was so extreme that staff were moved from Ms. Linn's office area to the other side of the floor. R2-335:11 through 336.

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[2] For convenience, citations to exhibits will be in the format GC-# for exhibits proffered by the General Counsel and Resp-# for exhibits proffered by Respondent TDA.

[3] In TDA's nomenclature, supervisors are referred to as "directors," GC-3, notwithstanding the fact that members of the organization's board of directors sometimes are referred to as directors as well.

5. Although Ms. Linn twice gave Simms time off to compose herself, R2-352:22 through 353:3, Simms' disruptive behavior continued, resulting in her termination on February 27, 2006. GC-26.

6. Subsequently, Ms. Linn and the then-president of TDA, Dr. Richard Black, informed chairs of the committees staffed by Simms that Simms had been terminated, but reassured them that their committees would continue to be properly staffed. R1-258:21 through 259:11. One committee chair, Dr. Jay Baxley, believed what Simms had told him: that she had been terminated for having an affair with Bond. R1-125:4:19. Dr. Baxley became "extremely agitated and unhappy" that Bond had not been fired as well. R1-259:8-11.

7. Despite being told by Dr. Black that the matter was "between the executive director and her staff," R1:259:12-14, Dr. Baxley obtained a record of Bond's 2003 citation for possession of drug paraphernalia. On March 21, 2006, Dr. Baxley faxed the record to the TDA Board, various TDA members, and certain TDA employees, including charging parties Nathan Clark and Patricia St. Germain. R1-127:15-21; *see* GC-33 (containing e-mail addresses nathan@tda.org and pat@tda.org).

8. The TDA board subsequently informed Dr. Baxley that the information concerning the citation was known to the Board's Personnel Committee, that Simms had threatened to sue TDA, that the matter was in the hands of legal counsel, and that he should "cease any involvement in these pending legal issues." R1-142:19 through143:14; Resp-1.

9. As a result of Dr. Baxley's e-mail, however, certain TDA employees, including Clark and St. Germain, became upset about what they perceived as the unfair treatment of Simms in comparison to the treatment of Bond. R1:157:1-6; R1-206:16-21; R1-299:10-20.

Although Simms and Bond were both supervisors, neither supervised either Clark or St. Germain; their supervisor was Laura Haufler. GC-3; R1-152:10-16.

10. Clark, who has an undergraduate degree in management and one year of law school, R1-173:9-15, had long been critical of Ms. Linn, who had twice refused to promote him. R2-349:9 through 351:10. Although he lacks a degree in accounting or tax law and is not a CPA, Clark felt competent to evaluate for himself (despite instructions from his supervisor who *is* a CPA) the characterization of certain expenses and had refused to record expenses as instructed if, in his sole judgment, the characterization was improper. R1-185:15 through 187:14, 189:12 through 190:19. Clark also disliked Ms. Linn's practice of turning expense receipts in "late." R1-184:2 through 185:8

11. Realizing that Dr. Baxley's interference in Simms' discharge was an opportunity to cause trouble for Ms. Linn, Clark invited certain employees to an off-site meeting in late March 2006 or early April. At that meeting, he presented them with a "petition" and asked them to sign it anonymously. R1-203:13 through 205:3.

12. Clark testified that he drafted the petition on his personal computer *after* this meeting, R1:156:19-23; however, his testimony on this point is not credible. First, two other witnesses – Theresa Kim, who had nothing to gain, and Lockerman, a charging party – testified that Clark presented the petition at the meeting. R1-203:1 through 204:22 (Question to Kim: "So this document was presented to you at that meeting?" Answer: "Yes"); R1-225:23 through 226:2 (Lockerman: "...and then it got into Nathan presented me with the petition, so that I could read it for myself ...."). Second, Clark claims not to have used his TDA computer to draft the petition, R1-156:19-23; however, this testimony is not credible because a subsequent forensic analysis revealed fragments of the petition on the hard drive of the TDA computer assigned to him and

saved in the "snapshots" taken at various times by the system as a protection against viruses or other loss. GC-11, paras. 11-15. Despite Clark's contrary testimony, there is no explanation for how fragments of the petition could be found on the hard drive and saved in "snapshots" made at different times other than his having made use of the TDA computer to do something with the petition, not just open it.

13. The petition was vague in its complaints, listing only "poor management, a dwindling morale, and a declining work ethic" and "poor management, negligence, and unfair treatment." GC-8. Notably, the petition did not list certain building conditions that Clark – two years later – testified were among his concerns when he drafted the petition. R1-183:9-13. As with Clark's testimony that he drafted the petition *after* meeting with the employees and that he did not do so on a TDA computer, his testimony on this point is not credible. First, these were not the concerns of the only other known signatory with no axe to grind, Kim. *See infra*, para. 15. Second, the resolution Clark drafted for Dr. Baxley's consideration never mentioned building conditions, GC-34, and his letter transmitting the petition to Dr. Baxley mentioned only a "possible problem with the current management and handling of delicate staff issues." *Id.* The delicate staff issue Dr. Baxley was concerned about was Simms' discharge and TDA's retaining Bond.

14. Further, neither Clark's unemployment application, GC-2a ("unethical and illegal management practices"), nor his original charge, GC-1(a) ("requesting employees to perform illegal acts, terminating employees for attempting to report illegal workplace activities, and attempts by management to financially defraud the organization's membership by misrepresenting financial expenditures on financial reports"), mentioned problems with the building.

15. Although Kim signed the petition (with an alias), her reason had nothing to do with the terms and conditions of her work. "The primary reason why I signed this was because I was concerned about the fairness of the termination of one of our former employees there....Katherine Simms." R1-206:16-21. Kim named no other issues. R1-206:22-23.

16. Although St. Germain testified that the employees at the meeting were "complaining about all of the things that were going wrong and the difficulties they were having with [Ms. Linn]," R1-276:16-18, her May 18, 2006 e-mail to the TDA board and others mentions nothing concerning problems with the building, but only Simms' discharge, GC-10 at 1, a complaint about perceived favoritism, *id.* at 2, and some questioning of a former receptionist's workload, despite St. Germain's recognition that the former receptionist had "secured a new job on her own ... and is now quite happy in her new position." *Id.* . Like Kim, St. Germain did not complain about the alleged financial irregularities that concerned Clark.

17. After Clark obtained Kim's alias signature ("Atticus"), R1-206:6-9, and charging party St. Germain's alias signature ("Feather 7"), R1-277:19-22, he forwarded the petition to Dr. Baxley, along with Clark's draft of a proposed resolution for Dr. Baxley to present at TDA's annual meeting. R1-162:2-18; GC-8; GC-34. Although other aliases are listed on the petition, aside from charging parties Clark and St. Germain, only Kim testified to having signed it. Aside from Kim, and charging parties Clark and St. Germain, the General Counsel presented no other TDA employee to testify to having known about or having signed the petition.

18. Lockerman, a supervisor who was general manager of a TDA affiliate, TDA Financial Services, Inc., GC-3, was invited to and did attend the meeting. On her way to the meeting, she called TDA member David May, who testified that Lockerman told him, "there were some employees at the Texas Dental Association who were upset with the way in which the

Simms issue…was handled, and that they were going to have an anonymous type of thing…go to the house of delegates." R2-323:24 through 324:9.

19. May counseled her not to involve herself with the meeting: "In my discussion with her, I expressed to her that I felt like this is not something she should do, that this was not having to do with her job and her position at the association, and that it was my advice to her that she not be any part of this, and that, you know, I would counsel her to please not do this." R2-323:24 through 324:15.

20. Lockerman had a history of negativity, R2-370:17-20, and of complaining about not being a part of what she called Ms. Linn's "good-old-girl network," R2-318:18 through 319:1, although Dr. May, who had worked with Lockerman when he served as president of TDA's subsidiary, Financial Services, Inc., R2:317, 19-21, 318:9-17, had counseled her that what she disliked was just a difference in management style. R2-319:14-17.

21. Lockerman also had a pattern of undermining Ms. Linn's authority and in fact had been written up for doing so, R1-84:13 through 86:4, R2-369:12 through 370:16, which she resented. R1-245:15 through 246:1 and 246:10-17.

22. Initially, Lockerman planned to sign the petition, but decided not to after discussing the matter with her husband. R1-227:6-14. Although she was a supervisor, Lockerman did not alert Ms. Linn to the employees' plans cause maximum disruption by at TDA's annual meeting by having Dr. Baxley present the anonymous petition to the assembled delegates.

23. Despite being told to stop involving himself in personnel issues, Dr. Baxley attempted to bring the petition and resolution to the attention of TDA's House of Delegates at its 2006 annual meeting in early May. R1-300:1 through 131:11.

24. After learning that Dr. Baxley's attempt to involve the House of Delegates in personnel issues had been ruled out of order, St. Germain sent two anonymous e-mails to certain TDA board members and others. GC-10; R1:279:10 through 280:14.

25. On May 17, 2006, Ms. Linn attempted to find out what the staff's specific complaints were. At a staff meeting, and in a follow-up e-mail, she stated, "*In order to allow one more opportunity to discuss any concerns within appropriate channels*, I expect that anyone who has participated in anyway in these anonymous communications to call or e-mail me by the end of this week to schedule an appointment with me on an individual basis....This is a requirement of your employment & this is a matter that we intend to resolve." R1-230:10-25; GC-9 (emphasis added).

26. Despite this clear direction, Clark did not comply. R1-195:2-13; R1-231:1-3. Instead, he continued his efforts to meddle in the Simms situation.

27. In late May of 2006, after the annual meeting, when Clark learned that a settlement had been reached with Simms, he and St. Germain called TDA's outside auditor in an attempt to find out more about it. R2-360:7 through 361:16. Although Clark and St. Germain testified that they only wanted to know how to code the settlement amount, their testimony on this point is not credible. First, their superior, a CPA, had instructed them to code the amount as wages. R1-296:25 through 297:3. Second, the auditor was sufficiently concerned about the tenor of their questions to inform Ms. Linn of the call and tell her that they wanted to know the details of the confidential settlement. R2-360:7-24, 361:3-16.

28. Further, Clark testified that, despite the instructions of his superior, a CPA, and despite his own lack of training or expertise in the characterization of settlements, R1-184:15 through 186:12, he viewed treating the settlement amount as wages was "inappropriate and

unethical." R1:187:3-14. In Clark's view, any failure to conform to his view of the way financial reporting should be handled was "fraud," which at the hearing he claimed was a basis for his signing the petition, although he admitted that the petition itself nowhere mentioned financial fraud, R1-181:9-16, no one else testified to a concern about financial fraud, and TDA's outside auditors always gave TDA a clean audit opinion. R2-367:10-15, 368:4-9.

29. At about the time that a forensic analysis of the hard drive of Clark's TDA computer revealed that it contained fragments of the petition automatically saved at various times, GC-11, paras. 11-15, Ms. Linn also discovered that Lockerman, a supervisor, had known ahead of time a petition was to be presented to the House of Delegates, but had failed to inform Ms. Linn either when she learned about the employees' actions and concerns. GC-16, GC-17, GC-18. In addition, Lockerman had failed to comply with Ms. Linn's attempt to find out what the employees' concerns were. GC-9.

30. On August 17, 2006, Ms. Linn discharged Clark for inserting himself into areas outside of his responsibilities, insubordination, and violating the electronic communications policy. R1-154:8-10; GC-7; GC-26. She also discharged Lockerman for undermining her authority and insubordination as a manager and as an employee, GC-16; R1-221:24 through 222:3, and reprimanded St. Germain for attempting to find out the details of Simms' confidential settlement. R1-14-16; GC-24.

31. Clark and Lockerman subsequently filed charges with the NLRB.[4]

II. Exceptions

TDA excepts to the following findings of fact/conclusions of law in the ALJ's decision:

[4] St. Germain later filed charges complaining that TDA's counsel had attempted to interrogate her without first giving her the *Johnnie's Poultry* warnings. The judge found against her and, because TDA does not except to any part of that finding, TDA does not address that issue in this brief.

1. The ALJ erred in concluding that TDA committed an unfair labor practice by terminating Clark and Lockerman. *Decision* at p.1; p.10, lines 15-18; p.12, lines 48-50; p.14, para. 1; and p.15, para. 2.

2. The ALJ erred in concluding that Clark had engaged in protected concerted action, *Decision* at p.9, lines 20-23, because Clark's complaints were his alone; the other staff members were concerned only about the discharge of a supervisor whose discharge did not affect their working conditions.

3. The ALJ erred in concluding that TDA disparately enforced its Electronics Communication Policy by discharging Clark, *Decision* at p.10, lines 46-51, because there is no evidence that TDA failed to enforce its policy with respect to comparable communications.

4. The ALJ erred in finding that Clark drafted the anonymous petition on his personal computer, *Decision* at p.3, lines 46-47, because an expert report showed otherwise.

5. The ALJ erred in finding that Clark's testimony was credible, *Decision* at p.4, lines 1-2, because his testimony was inconsistent with all the contemporary documents, as well as with his application for unemployment and with the original charge filed immediately after discharge.

6. The ALJ erred in finding that Lockerman told Dr. May that the she had no idea what the employees would discuss at the meeting off-site, *Decision* at p.4, lines 6-7, because Lockerman had reason to dissemble, unlike the witness who testified that Lockerman told him the employees were concerned with Simms' discharge.

7. The ALJ erred in finding that St. Germain sent an e-mail to only the current and incoming presidents of TDA, *Decision* at p.5, because the testimony and the e-mail addresses on

the exhibit demonstrate that she wrote to other TDA members, including those who were not on the Board of Directors.

8. The ALJ erred in finding that Lockerman's testimony was credible, *Decision* at p.4, lines 6-12, because she had reason to dissemble, unlike the witnesses whose testimony contradicted hers.

9. The ALJ erred in finding that the employee petition was sent only to members of the Board of Directors and not to TDA members, including members of the House of Delegates, *Decision* at p.2, lines 36-43, p.7, lines 39-40, and p.10, lines 2-4, (a prohibited use of members' personal e-mail addresses), because two witnesses testified without contradiction that several TDA members, in addition to members of the Board of Directors, received the e-mails. R2-366:10-25; R1-260:12-20.

10. The ALJ erred in finding that only a "fragment" of the anonymous petition was found on Clark's TDA hard drive and that all Clark did was open the petition at work on TDA equipment, *Decision* at p.5, lines 41-46, because the expert report proved that fragments of the petition were found in various "snapshots" of the file system taken automatically at different times, indicating that the petition was saved in the system at more than one point in time.

11. The ALJ erred in finding that Ms. Linn's failure to discharge a supervisor suspected of withholding information, while discharging Lockerman, "confirms the perception of employees...relating to unfairness," *Decision* at p.6, lines 16-22, because the evidence is that Ms. Linn to this day does not know whether the supervisor withheld information, R1-97:2-6, 97:15 through 98:4, but it is uncontested that Lockerman actually did so.

12. The ALJ erred in finding that Ms. Linn lacked support for her "guess" that Clark and St. Germain were seeking more information regarding the settlement of the discharged

supervisor's claim than merely its amount and how to code it when they called TDA's outside auditor, *Decision* at p.6, line 45, because Ms. Linn testified that she only learned of their inquiries when the auditor called her out of concern and told her that they were seeking "more information than just how to code" the settlement. R2-360:7-24.

13. The ALJ erred in finding that there were inherent contradictions between the Information Technology and Electronics Communications Policies, given that employees occasionally used the e-mail for personal messages, *Decision* at p.7, lines 10-11, because there is no evidence that any employee used the confidential e-mail addresses of TDA members for any personal messages or organizational efforts, as Clark did (if he did). *Decision* at p.4.

14. The ALJ erred in finding that because TDA published a public membership directory, Clark did not violate the electronics communication policy by e-mailing anyone but the Board of Directors, *Decision* at p.7, lines 20-23 and p.10, lines 41-43, when the undisputed testimony is that e-mail addresses are not published in the membership directory and are kept confidential, R-52:21 through 53:13, there is no evidence that TDA ever permitted any employee to use its members' e-mail addresses for any purpose similar to Clark's, and two witnesses testified without contradiction that several members of the House of Delegates, in addition to members of the Board of Directors, received the e-mails. R2-366:10-25; R1-260:12-20.

15. The ALJ erred in crediting Clark's testimony "without contradiction" that one employee who signed the petition complained about hours being taken off her time card and that another complained about alleged sexual harassment, *Decision* at p.8, lines 48-49, because the General Counsel did not present these employees – if they exist – to corroborate his testimony and, since TDA has no knowledge of who these employees might be, TDA has no way to

contradict Clark's testimony, which is nothing but uncorroborated, self-serving hearsay, contradicted by contemporaneous evidence.

16. The ALJ erred in finding that "the activity of the employees herein was not confined to the Simms situation," *Decision* at p.8, lines 51-52, because the contemporary evidence and the testimony of employees with no ax to grind – as opposed to Clark and St. Germain's self-serving testimony two years later – evidences that the employees' concern was limited to the treatment of supervisors, which is not protected activity. *See* GC-34, Clark's cover letter transmitting the petition to Baxley, which mentions only "a possible problem with current management and handling of delicate staff issues."

17. The ALJ erred in finding that Ms. Linn believed the petition related to protected concerted action, *Decision* at p.9, lines 17-20. Ms. Linn's specific testimony was that she read the petition at the time and she did not understand it to have anything to do with employee working conditions. R2-348:25 through 349:4.

18. The ALJ erred in concluding that Clark's actions were part of "protected concerted activity," *Decision* at p.9, lines 21-23, because the evidence establishes that to the extent that the employees were concerned about the same issue, it was the discharge of one supervisor and the failure to discharge another supervisor, neither of whom affected their working conditions. The other issues either were made up after-the-fact (in the case of problems with the building) or were purely individual, not group, concerns.

19. The ALJ erred in finding that there is no evidence that Clark sought information about a confidential settlement with the discharged supervisor, *Decision* at p.9, lines 28 and 33, because Ms. Linn testified that she only learned of his inquiries when the auditor called her out

of concern and told her that they were seeking "more information than just how to code" the settlement. R2-360:7-24.

20. The ALJ erred in finding that the reasons given for Lockerman's discharge were pretextual. *Decision* at p.11, lines 13-14. Lockerman had a history of undermining Ms. Linn, of negativity, and of resenting what she viewed as the "good old girls network." She was disloyal in failing to alert Ms. Linn to the employees' plans to have a disruptive anonymous petition presented at the annual meeting. These facts are uncontradicted and by themselves were a sufficient reason for her discharge.

21. The ALJ erred in finding that "the sole reason for Lockerman's discharge was her failure to come forward with her knowledge relating to the petition, *after Linn directed all employees and supervisors to do so on May 17*." *Decision* at p.11, lines 13-15 (emphasis added). Lockerman was discharged when Ms. Linn discovered that Lockerman had known what the employees were planning to do before the issue was raised at the annual meeting but had not alerted her to what was going on. GC-17 ("[Lockerman] did say…that she knew what they were planning to do … [and] didn't bring the matter to you, the Executive Director… [because] she didn't feel that was appropriate."); *see also,* GC-18. Lockerman testified that she had known about the employees' actions because she attended the offsite meeting where Clark presented the petition for them to sign, *see supra,* so the fact that she had been disloyal is not at issue.

22. The ALJ erred in concluding that TDA violated the Act by discharging Lockerman, a supervisor, for failing to divulge information that she had acquired innocently, *Decision* at p.12, lines 48-50, because there is no evidence in the record that TDA's purpose in terminating Lockerman's employment was to interfere with, restrain, or coerce non-supervisory employees in the exercise of their § 7 rights, and thus there was no evidence of a violation. *See*

Russell Stover Candies, Inc. v. NLRB, 551 F.2d 204, 208 (8th Cir. 1977); *General Engineering, Inc. v. NLRB*, 311 F.2d 570, 574 (9th Cir. 1962), *disagreed with on other grounds in N.L.R.B. v. Raytheon Co.*, 398 U.S. 25 (1970).

III. Argument and Authorities

A. Governing Law

To establish that TDA's discharge of Clark violated the Act, General Counsel must first establish that the conduct for which Clark was terminated was "protected concerted activity." *See Koch Supplies Inc. v. NLRB*, 646 F.2d 1257, 1259 (8th Cir. 1981). The proper framework for this type of claim is to determine: 1) whether the employee was participating in protected "concerted activity;" 2) whether the employer knew or should have known of Clark's participation in the "concerted activity;" and 3) whether Clark's discharge was motivated by his participation in the protected concerted activity. *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 721 (5th Cir. 1973), *disagreed with on other grounds by NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984). The General Counsel must provide "substantial evidence in the record showing that the employee was engaged in concerted activity *for the purpose of mutual aid and protection* and that the employer had some knowledge of this at the time of the discharge." *Id.* at 717 (emphasis added).

"A violation of § 8(a)(1) is established if (1) the employee's activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was 'protected' by the act; and (4) the discharge or other adverse personnel action was motivated by the protected activity." *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 89 (2d Cir. 1990) (*citing Meyers Ind., Inc.*, 268 N.L.R.B. 493, 497 (1984), *remanded sub nom., Prill v. NLRB,* 755 F.2d 941 (D.C. Cir. 1985), *enf'd, Prill v. NLRB,* 835 F.2d 1481, (D.C. Cir. 1987), *cert. denied,* 487 U.S. 1205 (1988)). Of

course, "[t]here can ... be no violation of § 8(a)(1) by the employer if there is no underlying § 7 conduct by the employee. Conduct must be both concerted and protected to fall within § 7." *Yesterday's Children, Inc. v. NLRB,* 115 F.3d 36, 44 (1st Cir. 1997) (cited by *Smithfield Packing Co. v. NLRB,* 510 F.3d 507, 516 (4th Cir. 2007)).

The General Counsel may succeed in such a claim only if the conduct amounted to "concerted activities for the purpose of ...mutual aid and protection," 29 U.S.C. § 158(a)(1); *Bob Evans Farms, Inc. v. NLRB,* 163 F.3d 1012, 1021 (7th Cir. 1998), which has been interpreted to mean that the underlying dispute must relate to the terms and conditions of work. *Bob Evans Farms,* 163 F.3rd at 1021 (*citing NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 17 (1962)). Individual griping and complaining are not protected concerted activity, *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d at 718-19, nor does the Act "protect employees who protest a managerial action that has no bearing on such terms and conditions." *Bob Evans Farms,* 163 F.3d at 1021.

B. Argument and Authorities

1. The conduct at issue was not "protected" within the meaning of the Act because it involved complaints about the discharge of a supervisor, not the terms and conditions of TDA employees' work.

Here, because three employees signed the petition and all three were concerned about the perceived "unfairness" of Simms' discharge, TDA does not dispute that their action was concerted with respect to that issue. What TDA does dispute is whether the concerted action with respect to that issue involved their terms and conditions of employment – rather than management's decisions concerning a supervisor – and thus was protected by the Act.

As the facts *supra* demonstrate, the genesis of the petition was not a complaint about wages, hours, or any other terms and conditions of employment, but a complaint that Simms, a

supervisor, had been unfairly treated. R1:157:1-6; R1-299:10-20. R1-206:16-21 ("I was concerned about the fairness of the termination of …Katherine Simms).

Although Simms was a supervisor, she did not supervise either Clark or St. Germain; their supervisor was Laura Haufler. GC-3; R1-152:10-16. Nor is there any evidence in the record – testimonial or otherwise – that Simms' discharge affected the terms and conditions of work for Clark, St. Germain, Kim, or any other employees involved in the petition, if in fact any other employees *were* involved.

The general rule is that an "employee protest in response to personnel decisions regarding management is protected under § 7 only when such protest is 'in fact a protest over the actual conditions of [the employees'] employment' and the 'means of protest [are] reasonable.'" *Smithfield Packing Co.,* 510 F.3d at 517 (*citing Yesterday's Children, Inc.,* 115 F.3d at 45); *accord, Bob Evans Farms,* 163 F2d at 1021-22; *Oakes Mach. Corp.,* 897 F.2d at 89; *Puerto Rico Food Products Corp. v. NLRB,* 619 F.2d 153, 156 (1st Cir. 1980); *NLRB v. Okla-Inn,* 488 F.2d 498 (10th Cir. 1973); *Guernsey-Muskingum Elec. Co-Op, Inc.,* 285 F.2d 8 (6th Cir. 1960). "Employee action seeking to influence the identity of management hierarchy is normally unprotected activity because it lies outside the sphere of legitimate employee interest." *NLRB v. Oakes Mach. Corp.*, 897 F.2d at 89.

Because these employees' complaints concerning Simms had nothing to do with the employees' conditions of employment, TDA's termination of Clark did not violate the Act.

2. Clark's complaints concerning building conditions and "alleged financial fraud" are not protected because they were not the complaints of any employee but himself.

Should the General Counsel argue that the petition and associated e-mails were in fact complaints about the terms and conditions of work because of Clark's testimony that the petition

included complaints about a temporarily unlit stairwell, standing water in part of the parking lot after a rain, and mildewed wallpaper, this claim should be rejected as well. First, Clark's testimony on this point is not credible, in part because Ms. Linn's testimony that the conditions had been remedied is uncontested. R2-343:15 through 345:20. Second, these complaints were not made in the petition or in any other contemporaneous document, but were contrived after the fact. The petition lists only "poor management, a dwindling morale, and a declining work ethic" and "poor management, negligence, and unfair treatment." GC-8. Clark's letter transmitting the petition to Dr. Baxley, whose specific concern was Simms' having been discharged while her paramour was not, echoed that concern and that concern alone. All it mentioned was a "possible problem with the current management and handling of delicate staff issues." GC-34.

Neither the petition nor Clark's transmittal letter mentioned the building conditions that Clark testified were among his personal concerns when he drafted the petition. R1-183:9-13. As with Clark's testimony that he did not draft the petition on a TDA computer, his testimony on this point is not credible because these were not the concerns of the two other known signatories to the petition and because the resolution Clark drafted for Dr. Baxley's consideration never mentioned building conditions. GC-34. What it did mention was a "possible problem with the current management and handling of delicate staff issues." *Id.* Further, the only employee to testify who is not a charging party testified clearly that her reason for signing had nothing to do with the terms and conditions of her work. Teresa Kim stated that "[t]he primary reason why I signed this was because I was concerned about the fairness of the termination of one of our former employees there....Katherine Simms." R1-206:16-21. Kim testified to no other issues. R1-206:22-23. Even charging party St. Germain, who at trial identified photos (of unknown

vintage) as photos she had taken as "a metaphor…for a lot of things that were going wrong." R1-298:25 through 299:9.

Her May 18, 2006 e-mail to the TDA board and others, however, mentions nothing concerning problems with the building, but only Simms's discharge, GC-10 at 1, a complaint about perceived favoritism, *id.* at 2, and some questioning of a former receptionist's workload (despite St. Germain's recognition that the former receptionist had "secured a new job on her own … and is now quite happy in her new position."). *Id.* Similarly, Dr. May – whom Lockerman had called on the way to the employee meeting – testified that she told him "there were some employees at the Texas Dental Association who were upset with the way in which the Simms issue…was handled, and that they were going to have an anonymous thing…go to the house of delegates." R2-324:4-9.

Indeed, not only does Clark's actual charge (filed on December 12, 2006), fail to mention building issues, GC-1(a), but his Application for Unemployment Benefits states only, "Employer obtained proof that I had been involved with other staff in attempting to whistle blow—to better the association—about unethical and illegal management practices."[5] GC-12. In fact, at one point, Clark testified, "Like I said, each employee had their own issues…*And mine was with the building*, the thing I already mentioned about the stairway that was an emergency exit not being lighted." R1-183:9-13 (emphasis added). Clark's statement, however, is not supported by any of the contemporaneous documents – not the petition he drafted, not the resolution he drafted, not his e-mail to the board and other members of the association, not his application for unemployment compensation, and not his actual charge. Further, Clark's allegations concerning "financial fraud" likewise were of concern only to him because neither Kim nor St. Germain listed them as being one of the problems they sought to address through the petition. A single

employee's complaint about a work condition that is only of concern to him is not protected activity because it is not concerted. *NLRB v. Esco Elevators, Inc.,* 736 F.2d 295, 300 (5th Cir. 1984). Here – other than Clark's testimony – there is no evidence that either the building conditions or the alleged "financial fraud" issues were encompassed in the petition.[6]

3. In the alternative, even if the conduct were "protected," Clark was not discharged for engaging in protected conduct.

Under the *Wright Line* test, if General Counsel had carried his initial burden of proving that protected concerted activity was a motivating factor in Clark's termination, the burden then would shift to TDA to show that it would have terminated Clark in the absence of the protected conduct. *See NLRB v. Ryder/P.I.E. Nationwide, Inc.*, 810 F.2d 502, 507 (5th Cir. 1987) (citing *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1981), *enf'd,* 662 F.2d 899 (1st Cir. 1981)). "Proof that the discharge would have occurred irrespective of the employee's protected activity and for valid reasons amounts to an affirmative defense on which the employer carries the burden of proof by a preponderance of the evidence." *NLRB v. Associated Milk Producers, Inc.*, 711 F.2d 627, 629 (5th Cir. 1983). The *Wright Line* test is based on the fundamental principal that "[m]anagement can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific qualification; it may not discharge when the real motivating purpose is to do that which" the Act forbids. *Wright Line*, 251 N.L.R.B. at 1084.

Although violating TDA's electronic communications policy was one of the reasons given for Clark's discharge, GC-7; R1-52:21 through 53:13, Ms. Linn testified that she would

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[5] Clark's application for unemployment benefits was denied. R1-77:25 through 78:1.

[6] St. Germain testified that she was concerned about water in the parking lot when it rained; however, her concern was not for herself or for other employees, but for other tenants in the building. "The condition of the building seemed to be a metaphor at the time for a lot of things that were going wrong. It was something that we were having

have discharged any employee who had gone outside of his responsibilities to obtain information about a confidential settlement and also had failed to come forward about an incident in the office when asked to do so. R2-356:6-13. She also testified she would have terminated any employee who used TDA's confidential e-mail list to bring confidential personnel issues to the attention of those outside of the board of directors, R2-355: 1-6, as Clark had done. Further, Ms. Linn testified that she would not have fired someone who had admitted being part of the petition and then stated their complaints. Instead, she testified, "I would have certainly listened to their complaint....I would have listened to them and counseled them on how to appropriately go through the complaint process," just as she had done with Simms, despite Simms' disruptive behavior. R2-352:11-24. There simply is no evidence that Clark was discharged because he engaged in protected concerted activity (which he was not), rather than for violating the electronics communication policy by using the confidential e-mail addresses of non-Board members, disobeying a direct order, and attempting to obtain the details of a confidential settlement to further inflame dissension concerning Simms' discharge.

After citing to the Board's recent decision in *Register Guard*, 351 NLRB No. 70 (2007), the ALJ states that "[i]nsofar as Clark would not have been discharged absent his protected activity, the disparate enforcement of [TDA's electronic communications] policy is subsumed in my finding that the Respondent discharged Clark for engaging in protected concerted activity." Pursuant to *Register Guard*, the ALJ did not perform the proper analysis to determine if TDA disparately enforced its electronic communications policy.

In *Register Guard*, an employee alleged disparate enforcement of her employer's e-mail policy; the employer prohibited the employee's union-related e-mails while allowing other

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problems with. I had witnessed myself building tenants getting out of their cars in ankle-deep water." R1-299:4-8. Note what St. Germain does not say: that this affected her or any other TDA employee.

nonwork-related emails including "jokes, baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking." 2007 WL 4540458 at *10 (2007). In particular, the court noted that the employer had allowed employee e-mails soliciting support for the United Way. *Id.* The employee argued, and the administrative law judge agreed, that "[i]f an employer allows employees to use its communications equipment for nonwork related purposes, it may not validly prohibit employee use of communications equipment for Section 7 purposes." *Id.*

The Board rejected this reasoning and held that disparate enforcement must be along Section 7 lines to be unlawful. *Id.* at *11. That is, "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status....For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees." *Id.* at 11-12. The Act, however, does not prohibit an employer from discriminating based on non-Section 7 grounds. *Id.* at 12.

The general counsel failed to carry its burden on its disparate enforcement allegation by failing to present any evidence that TDA allowed e-mails of a similar character to the anonymous petition while discharging Clark because of the petition's Section 7-protected status. The ALJ's reliance on the fact that TDA allowed "multiple personal e-mails from and to various employees and supervisors at the Austin office, the forwarding of jokes, and solicitation for the sale of Girl Scout Cookies" is misplaced. Under *Register Guard*'s disparate enforcement analysis, these types of e-mails are irrelevant because they are not the same type of e-mails as Clark's. Therefore, TDA's exception to the ALJ's finding on this issue should be granted.

C. Lockerman's discharge was lawful.

1. Lockerman's claim fails because TDA's employees did not engage in protected concerted activity.

Lockerman was discharged for "insubordination on two levels-as a manager and an employee" and for "a pattern of undermining [Ms. Linn's] authority." GC-16. Lockerman claims that she was discharged because she "refused to come forward with knowledge of the events and/or the identity of the employees involved in the concerted activity" in which TDA employees were allegedly engaged.

As an initial point, if the General Counsel failed to prove that TDA employees were engaged in protected concerted activity, Lockerman's claim fails as well because it cannot be an unfair labor practice to report unprotected activity. Based on the arguments and authorities *supra*, including that the anonymous petition did not address the employees' terms and conditions of work, the concerted activity, if any, was not protected under the Act; therefore, Lockerman's claim fails on this ground alone. Even if the employees were engaged in protected concerted activity, however, Lockerman's discharge would not be a violation of the Act because TDA had a right to expect loyalty from a supervisor and Lockerman's failure to alert TDA to the employee's plans to disrupt the annual convention, as well as her later decision not to disclose the basis of the employee's complaints, was disloyal, as well as insubordinate.

2. Lockerman's discharge because she was disloyal in not reporting that the employees were planning to disrupt the annual meeting is not a violation of the Act.

Several courts of appeal, including the Fifth Circuit, have held that the discharge of a supervisor can violate § 8(a)(1) of the Act "if an employer discharges a supervisor because he refused to engage in unfair labor practices." *Russell Stover Candies, Inc. v. National Labor*

Relations Bd., 551 F.2d 204 (8th Cir. 1977). For example, violations have been found when an employer discharged a supervisor for refusing to continue unlawful surveillance of union activities, *id.* at 208; where a supervisor was fired for testifying before the NLRB, *NLRB v. Southland Paint Co.,* 394 F.2d 717 (5th Cir. 1968) and *Oil City Brass Works v. NLRB,* 357 F.2d 466 (5th Cir. 1966); where a supervisor's discharge was a preliminary step to discharging his pro-union crew, *Pioneer Drilling Co. v. NLRB,* 391 F.2d 961 (10th Cir. 1968); and where a supervisor was fired for failing to discharge union adherents, *NLRB v. Miami Coca Cola Bottling Co.,* 341 F.2d 254 (5th Cir. 1965). The rationale is that "such a discharge interferes with nonsupervisory employees' protected self-organizational rights by demonstrating to the employees the extreme measures to which the employer will resort in order to thwart the organization efforts." *Russell Stover Candies,* 551 F.2d at 206 (cites omitted).

To establish a prima facie case, however, the general counsel must prove the employer's motive, i.e., that the supervisor was fired for refusing to commit an unfair labor practice. *Pioneer Hotel, Inc. v. NLRB,* 182 F.3d 939, 945 (D.C.Cir. 1999). The Fifth Circuit requires such proof. *Marshall Durbin Poultry Co. v. NLRB,* 39 F.3d 1312, 1315-16 (5th Cir. 1994); *see also, Automobile Salesmen's Local 1095 v. MLRB,* 711 F.2d 383, 386 (D.C.Cir. 1983). Here, however, there is no such proof of motive because the proof demonstrates that Lockerman had a history of negativity and undermining Ms. Linn; her failing to alert TDA by disclosing the employees' plans negates the conclusion that she was fired solely for failing to disclose the names of those involved, as the ALJ concluded. In fact, she testified that when she was discharged, there was no discussion at all. R1-234:4-20. There simply is no evidence that she ever was asked to divulge the names. As in *Pioneer Hotel,* the only evidence of a prohibited motive is Lockerman's testimony that she was thought that anyone who had been involved

would probably be fired. R1-231:1-13. There is no evidence, however, that she had any basis for that thought, nor is there evidence that she was fired for failing to reveal the names. Unlike the facts in *Howard Johnson Co. v. NLRB,* 702 F.2d 1, 3-4 (1st Cir. 1983), where the employer repeatedly questioned a supervisor concerning who attended a union meeting, and terminated her for failing to disclose names, Lockerman was never even questioned. The evidence that exists is that Ms. Linn wanted to know what the employees' concerns were. GC-9 ("In order to allow one more opportunity to discuss any concerns within appropriate channels, I expect that anyone who has participated in anyway in these anonymous communications to call or e-mail me by the end of this week to schedule an appointment....").

The Board has held that even a supervisor's report of union activity[7] is not an unfair labor practice where the information known by the supervisor was obtained innocently. *See P.R. Mallory Co., Inc.*, 175 NLRB 308, 313 (1969); *J.W. Mays, Inc.*, 147 NLRB 942, 948 n. 12 (1964); *South Rambler Co.*, 139 NLRB 1197, 1198 (1962). For example, in *Mallory*, a three-member panel of the Board found no evidence that the employer had terminated its supervisor because of his refusal to spy on and report on employees regarding their union activity. 175 NLRB at 313. Rather, the supervisor had been discharged, at most, "for not reporting to [the employer] information about employee union activity that he had innocently acquired," which is not a violation. *Id.* Here, Lockerman's failure to alert Ms. Linn to the employee's plans and complaints – information she had innocently acquired – was a legitimate reason for her discharge.

Similarly, in *J.W. Mays*, a three-member panel of the Board found that the supervisor had gone to a union meeting for the sole purpose of determining what advantages the union could

[7] All these cases involve union activity or union-organizing activity, which is not involved in this case. Not only were the TDA employees not trying to form a union, but TDA has never experienced any union-organizing activity.

provide him, 147 NLRB 942 at n. 11, and the supervisor had been invited to the union meeting by a union adherent and with the knowledge and consent of union representatives. *Id.* at 948. Therefore, the supervisor's subsequent report of the names of the attendees at the hearing was not unlawful surveillance. *Id.*

Further, in *South Rambler*, a supervisor attended a union meeting at the invitation of union members after he had reported his intention to attend to the general manager. 139 N.L.R.B. at 1198. The general manager told the supervisor to "go ahead." *Id.* The three-member panel of the Board found that the supervisor's attendance was not unlawful surveillance. *Id.* Here, not only did Lockerman acquire her knowledge of the employees' activity innocently, by attending a meeting to which she had been invited, but there is no evidence that TDA even knew anything about the meeting, and consequently no evidence that TDA directed her to attend the meeting for the purpose of acquiring information. Her failure to alert TDA to the employees' plans was disloyal to TDA's interests. As the Board has repeatedly recognized, "[m]anagement, like labor, must have faithful agents." *NLRB v. Sheraton Puerto Rico Corp.*, 651 F.2d 49, 51 (1st Cir. 1981)(cites omitted). As the Supreme Court has explained, "supervisors [are] management obliged to be loyal to their employer's interests." *Beasley v. Food Fair of N.C.*, 416 U.S. 653 (1974).

Lockerman, however, had a history of negativity, R2-370:17-20, and of complaining about not being a part of what she called Ms. Linn's "good-old-girl network," R2-318:18 through 319:1. She also had a pattern of undermining Ms. Linn's authority, to the point that Ms. Linn had written her up for doing so, R1-84:13 through 86:4, R2-369:12 through 370:16, which Lockerman resented. R1-245:15 through 246:1 and 246:10-17.

When Lockerman told other supervisors that she had known about what the employees were planning ahead of time, but had not alerted Ms. Linn, the other supervisors were stunned, GC-17, GC-18, and informed Ms. Linn. R1-86:21 through 87:5. Lockerman's failing to come forward with her knowledge after Ms. Linn's directive was the final straw. R1-88:21 through 89:9, 90:1:6.

Thus, because TDA did not direct Lockerman to spy on the employees and because Lockerman learned of their identities and plans innocently, TDA's discharging her for failing to alert it to the employee's planned disruption of the annual meeting was not unlawful. Her attendance at the employees' meeting and subsequent failure to alert TDA to the employee's plans – after she had been counseled by Dr. Wade not to involve herself in them – was disloyal. Her later refusal to comply with Ms. Linn's direction that anyone having knowledge of the complaints come forward was not only disloyal but insubordinate. Lockerman's history of undermining Ms. Linn and her known negativity, coupled with her failure to alert Ms. Linn to the employee's plans, was sufficient in and of itself to justify her discharge. Thus, the general counsel failed to make out a prima facie case that TDA's motive for discharging Lockerman was her failure to commit an unfair labor practice.

3. The General Counsel failed to show that TDA's non-supervisory employees knew the motive for Lockerman's termination.

Finally, the General Counsel was required show that non-supervisory TDA employees knew the reason for Lockerman's firing because courts have recognized that the only way the termination of a supervisor can interfere with, restrain, or coerce non-supervisory employees in the exercise of their § 7 rights is if the employees have knowledge that the supervisor was terminated for refusing to commit an unfair labor practice. *See Russell Stover Candies, Inc. v. NLRB*. 551 F.2d at 208; *see also, General Engineering*, 311 F.2d at 574. Not a single employee

– other than Lockerman herself – testified to having known why Lockerman had been discharged (or even *that* she had been discharged). Because General Counsel elicited no such testimony from any employee, there simply is no evidence that Lockerman's discharge interfered with, restrained, or coerced non-supervisory employees in the exercise of their organizational rights, *Russell Stover,* 551 F.2d at 208, and thus Lockerman's claim failed as a matter of law.

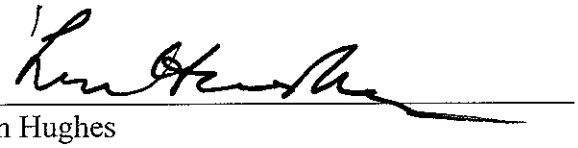
Finally, even if Lockerman's claim should be upheld, her remedy should be limited to back pay, not reinstatement. Although courts have sometimes ordered the reinstatement of a discharged supervisor, they have used this remedy "sparingly and only in narrowly defined circumstances," *NLRB v. Southern Plasma Corp.,* 626 F.2d 1287, 1294 (5th Cir. 1980) (cites omitted), because the only basis for protecting a supervisor "is that his discharge had a tendency to interfere with, restrain, or coerce the protected employees in the exercise of their section 7 rights." *Russell Stover,* 551 F.2d at 206-07. If there is no such proof, the discharge is lawful. *Wesley v. I.T.O. Corp. of Rhode Island,* 739 F.2d 683, 686 (1st Cir. 1984); *Automobile Salesmen's Union Local 1095 v. NLRB,* 711 F.2d 383, 387-88 (D.C. Cir. 1983). Here, there is no such proof – and requiring TDA to reinstate a disloyal supervisor – violates the principle that an employer is entitled to loyalty from its management employees.

IV. Request for Relief

For these reasons, Respondent respectfully requests that the Board sustain these exceptions and deny enforcement of the ALJ's decision.

Respectfully submitted,

McGINNIS, LOCHRIDGE & KILGORE, L.L.P.
William H. Bingham
State Bar No. 02324000
Lin Hughes
State Bar No. 10211100
Brian T. Thompson
State Bar No. 24051425
600 Congress Avenue
Suite 2100
Austin, Texas 78701
(512) 495-6000
(512) 495-6093 FAX

By: 
Lin Hughes

ATTORNEYS FOR TEXAS DENTAL ASSOCIATION

CERTIFICATE OF SERVICE

I herby certify that on May 8, 2008 a true and correct copy of the above was filed electronically through the Board's e-filing system. In addition, the original and four paper copies were sent regular mail to:

National Labor Relations Board
Region 16
615 East Houston Street, Suite 401
San Antonio, TX 78205-1711

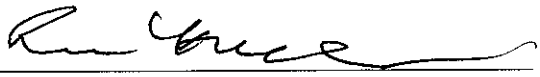
Copies were also sent via regular mail to:

Barbara Jean Lockerman
209 Byrne Street
Austin, Texas 78957

Nathan Clark
8801 La Cresada Drive, Apt 1536
Austin, Texas 78749

Patricia St. Germain
601 Davis Ranch Taod

San Marcos TX 78666



Lin Hughes